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No. _____

SUPREME COURT, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

James K. Jenkins
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Counsel of Record

QUESTION PRESENTED FOR REVIEW

Was the criminal prosecution of Petitioner barred by the applicable statute of limitations because:

(a) the statute of limitations expired during the 16 month period the indictment was sealed under Rule 6(e)(4), F.R.Crim.P.; and

(b) the Government failed to make a good faith effort to locate any of the defendants during the period the indictment was sealed; and

(c) the Government willfully caused the sealing to continue without any notice to the sealing court for nearly seven months after the location of the defendant whose arrest the sealing was intended to insure?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner Lawrence McKinley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 9, 1986, rehearing denied January 28, 1987.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed Petitioner's conviction without opinion, pursuant to Rule 25, Rules of the United States Court of Appeals for the Eleventh Circuit. This opinion is reprinted in the appendix hereto, p. 1a, infra. Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals for the Eleventh Circuit in an order reprinted in the appendix hereto, p. 2a, infra.

The memorandum decision of the United States District Court for the Northern District of Georgia (Tidwell, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

Petitioner's conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit on December 9, 1986,

with timely Petition for Rehearing and Suggestion for Rehearing En Banc being denied on January 28, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Rule 6, F.R.Crim.P.

(e)(4) Sealed Indictments.

The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

On October 19, 1982, a federal grand jury in Georgia returned an indictment charging Petitioner McKinley and six co-defendants with various marijuana related offenses occurring from October 1977 to September 1978 (R. Vol. 1). The appropriate praecipae and arrest warrants were issued on October 20, 1982 (Supp.R.

Vol. 1). The Government appeared before a United States Magistrate and informed the court that the lead defendant, Mitchell, had access to large sums of money and that Mitchell had indicated a propensity to flee. The magistrate granted the Government's request to seal the indictment pursuant to Rule 6(e)(4), F.R.Crim.P. (Supp.R. Vol. 3, p. 192; Supp.R. Vol.2).

On July 12, 1983, on the basis of information provided by the DEA agent in charge of the instant case, defendant Mitchell was arrested at his home in Alabama on a federal warrant for an unrelated indictment. One of the arresting officers was the IRS agent in charge of the tax aspect of the instant case, which resulted in the indictment here in question. Even though the DEA forms filled out at Mitchell's arrest listed the file title and number in the

instant case, the agents did not execute the outstanding arrest warrant on Mitchell because they had been instructed not to do so by a Government attorney. The magistrate who had sealed the instant indictment was not informed of Mitchell's arrest (Supp.R. Vol. 4, pp. 87-88, 130, 142-143, 196; Supp.R. Vol. 3, pp. 90-91). As a consequence, the indictment continued to remain sealed for nearly seven additional months (during which the statute of limitations expired), until Mitchell and four other defendants, having heard rumors of the indictment, surrendered themselves to the United States Marshal in Atlanta, Georgia in February, 1984. Only this unexpected mass surrender of defendants forced the unsealing (R. Vol. 1). Petitioner McKinley, who was then employed as the captain of a merchant ship in the Caribbean, and was not in touch with his

co-defendants, was not arrested. Even after the unsealing, no effort was made to notify Customs or other authorities of the arrest warrant which would have resulted in his arrest when he entered the United States, as he did on several occasions during the time the indictment remained sealed (R. Vol. 2-20-33; R. Vol. 4, pp. 37-38; Supp.R. Vol. 4, pp. 87-88, 142-143, 1966).

After extensive pretrial hearings as to the five original defendants, the district court entered an order dismissing all of the marijuana related counts, based on its conclusion that:

". . . the record indicates that the Government did not engage in a good faith investigative effort to find the defendants during the period from October, 1982 until January 1984." (Supp.R. Vol. 1).

The Government appealed this order to the United States Court of Appeals for

the Eleventh Circuit, which reversed. United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985), cert. denied, 106 S.Ct. 819 (1986).

During the pendancy of the Mitchell appeal in the Eleventh Circuit, Petitioner McKinley was arrested in Florida on the basis of unsolicited information from an estranged girlfriend. Petitioner moved to dismiss the indictment, based on the expiration of the statute of limitations and his Sixth Amendment right to speedy trial. The Mitchell record was adopted by stipulation of counsel and hearings were held on his separate motion (R. Vols. 2-5). Petitioner's motion was denied, based on the district court's conclusion that the intervening decision in Mitchell, supra, required the defendant to show "substantial, irreparable, actual prejudice." Appendix, p. 6a, infra. Under that standard, despite the

trial court's finding that the "question [of actual prejudice] was a close one" due to the destruction of Petitioner's business records during the period the indictment remained sealed, the court denied Petitioner's motion to dismiss. Id., pp. 11a-12a.

Petitioner proceeded to trial alone. All of the other defendants, with the exception of Mitchell, pled guilty and were sentenced to probation. Mitchell was tried separately on the tax-related charges and acquitted; his marijuana related charges were dismissed on the grounds of collateral estoppel. At Petitioner's trial, the court granted his motion for judgement of acquittal as to three counts; the jury returned a verdict of not guilty as to two counts, and found him guilty as to two counts. Petitioner was sentenced to a total of three years imprisonment, ten years special parole,

and five years probation (R. Vol. 1).

On appeal to the Eleventh Circuit, Petitioner's conviction was affirmed without opinion on December 9, 1986. Appendix, p. 1a, infra. On January 28, 1987, the Petition for Rehearing and Suggestion for Rehearing En Banc was denied. Appendix, p. 2a, infra.

REASONS FOR GRANTING THE WRIT

This case presents the important issue of the necessity to insure the existence of judicial supervision over the sealing of indictments pursuant to Rule 6(e)(4), F.R.Crim.P. where the sealing extends past the applicable statute of limitations. The standard evolving in the Circuit Courts of Appeal has created a situation where there is now no meaningful requirement that the sealing period be used to fulfill its stated purpose, and no real limits on the

duration of the sealing period. The effect of this is an abdication of this judicial function to the prosecuting attorney. Moreover, all actions of the prosecuting attorney have been effectively insulated from appellate review by requiring an aggreived defendant to make an all but impossible showing of substantial, irreparable, actual prejudice. The end result is, as in Petitioner's case, the complete evisceration of the protection against stale prosecutions historically afforded by the statute of limitations and the deprivation of any redress for even the most willful violation of any court's sealing order under Rule 6(e)(4).

With the ever-increasing frequency of complex prosecutions being brought on the very brink of the running of the statute of limitations, and not revealed or tried until years past its expiration, the

instant Petition encompasses an issue as to which this Court has never spoken, and where its guidance is greatly needed.

"There is a surprising dearth of authority upon the subject [of Rule 6(e)(4)]." United States v. Southland Corp., 760 F.2d 1366, 1379 (2d Cir. 1985). Existing authority agrees that when an indictment is returned within the time allowed under the applicable statute of limitations, 18 U.S.C. § 3282, it is timely. This timely filing tolls the statute of limitations. United States v. Grady, 544 F.2d 598, 601 (2d Cir. 1976). The Government may properly request the sealing of an indictment pursuant to Rule 6(e)(4), F.R.Crim.P., even though that period may extend beyond the statutory period. United States v. Michael, 180 F.2d 55 (3d Cir. 1949). An indictment sealed under this rule is timely even though the defendant is not arrested and

the indictment unsealed until after the expiration of the statutory period. United States v. Muse, 633 F.2d 1041 (2d Cir. 1980)(en banc); United States v. Southland Corp., supra; United States v. Edwards, 777 F.2d 644 (11th Cir. 1985); and United States v. Ramey, 791 F.2d 317 (4th Cir. 1986).

The standard that has evolved permits the sealing of an indictment for "any legitimate prosecutorial need . . ." Ramey, supra at 321; or "[W]here the public interest requires it, or for other sufficient reason" or "for sound reasons of policy." Southland, supra at 1379, 1380. See also Edwards, supra at 648.

Further, the decision of the magistrate in granting the sealing is entitled to "great deference," since the Government should be able, "except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an

indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when re-indictment is by hypothesis impossible." Southland, supra at 1380. Edwards, supra at 648-649.

As a corrollary, or perhaps as a product of this concern, the courts which have addressed the question of an indictment maintained under seal beyond the limitation period have required a defendant to show "substantial, irreparable and actual prejudice." Edwards, supra at 649; United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985); Ramey, supra at 322; United States v. Dennard, 722 F.2d 1510, 1513-14 (11th Cir. 1984).

Despite the stringency of the showing presently required to obtain redress for any harm occasioned by the sealing of an

indictment or any violations of Rule 6(e)(4), two essential protections remain encompassed by the procedures governing the sealing. These are, of course, in addition to the requirement that the sealing be to fulfill a legitimate prosecutorial need. First, as Circuit Judge Friendly noted in Southland, supra at 1380: "The limiting effect of the Rule [6(e)(4)] was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor [citation omitted]." Second, the Government may not request the sealing of an indictment for more than a reasonable time after the statute of limitations has expired. Edwards, supra; United States v. Watson, 599 F.2d 1149, 1155 (2d Cir. 1979), modified sub nom. United States v. Muse, supra.

Petitioner submits that these essential limitations, however, have been

rendered meaningless by the application of the substantial, irreparable and actual prejudice standard for relief. In doing so, the protections afforded by the statute of limitations, 18 U.S.C. §3282, preventing the Government from instituting prosecutions after excessively long delays, and thus prejudicing the defendant by increasing his difficulty in marshalling evidence, Toussie v. United States, 397 U.S. 112, 114-15, 90 S.Ct. 858, 859-60, 25 L.Ed. 2d 156 (1970), have been destroyed.

Actual prejudice, especially in the context of a case that is legally presumed stale is, at best, difficult to prove. As Mr. Justice Powell has stated:

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant

> past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

The virtual impossibility of proving actual prejudice is borne out in the instant record. Petitioner's memory, as well as certain business records which would have either refreshed his memory or proved his whereabouts in 1977-1978 had been destroyed during the period his indictment was sealed. Yet the district court ruled against Petitioner's proof of actual prejudice, concluding that although the question was a "close one", Petitioner had been impeached on a collateral point, and had therefore not met his burden. Appendix, pp. 11a-12a, infra.

This burden of proof is the origination of what is now an open field for prosecutorial exploitation that is not

only beyond meaningful review but, as in the circumstances here presented, constitutes nothing less than the usurpation of the judicial function of supervising the justification and duration of the sealing period.

In the instant case, after hearing evidence as to the Government's efforts to locate the indicted defendants, the district court ruled: ". . . the record indicates that the Government did not engage in a good faith investigative effort to find the defendants during the period of time from October, 1982 until January, 1984." (Supp.R. Vol. 1). This finding was upheld by the Eleventh Circuit. Mitchell, supra at 1547.[1]

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1. The Mitchell case, as to which Appellant was not a party, was presented and disposed of as a Sixth Amendment speedy trial case. Petitioner presents an independent ground of appeal based on due process and the statute of limitations.

Petitioner submits that the actual prejudice standard should not be used to eliminate the protection of the statute of limitations in such circumstances. United States v. Marion, 404 U.S. 307, 322-323, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971). A more proper standard is one that would require the moving party to act with diligence in prosecuting an indictment by the prompt service of an outstanding arrest warrant. Marion, id. at fn. 14. See also, 22 C.J.S. Criminal Law § 234, p. 609; Johnston v. Standard Mining Company, 148 U.S. 360, 13 S.Ct. 583 (1893); In re Clyne, 35 Pac. 23, 52 Kan. 441 (Kan. 1893); In re Griffith, 11 Pac. 174, 38 Kan. 377 (Kan. 1886); People v. Clement, 40 N.W. 190, 72 Mich. 116 (Mich. 1888). A similar standard has been applied to the prompt execution of probation and parole violation warrants. Simon v. Moseley, 452 F.2d 306, 309 (11th

Cir. 1971); United States v. Gernie, 228 F.Supp. 329, 337 (S.D.N.Y. 1964); United States v. Hill, 719 F.2d 1402 (9th Cir. 1983); United States v. Paden, 558 F.Supp. 636 (D.C. 1983).

However, under the standard that has evolved in the area of Rule 6(e)(4) sealings requiring a showing of substantial, irreparable, actual prejudice, the due diligence or even good faith of the party who is relying on the exception to the statute of limitations is virtually irrelevant. The effect of this standard in the instant case is to absolve the purposeful failure of the Government to made a good faith effort to even undertake to fulfill the legitimate prosecutorial need represented to the sealing magistrate under oath.

This, however was not the end of the Governmental misuse of the sealing of Petitioner's indictment. The only reason presented to the sealing magistrate was the need to assure the arrest of defendant Mitchell before he could flee (Supp.R. Vol. 2, pp. 3-7). No time limit for the duration of the sealing was specified. In such a case, the only reasonable reading of such a sealing order is to the effect that the indictment could only remain sealed until the legitimate prosecutorial purpose for its sealing was fulfilled -- i.e., the arrest of Mitchell. This was accomplished on July 12, 1983. Yet, despite the participation by federal officers knowledgeable of the existing warrant on the instant charges, Mitchell was neither arrested nor informed of the sealed indictment out of Georgia. Moreover, the DEA case agent in the instant case

testified that a Government attorney on this case told him not to arrest Mitchell on the instant case (Supp.R. Vol. 3, pp. 90-91). Even more significantly, the magistrate who authorized the sealing was not informed of Mitchell's arrest, nor was any authorization for the continued sealing sought or obtained. The result was that the indictment remained sealed for an additional seven months, to be unsealed only after the sua sponte mass surrender of five of the defendants who had apparently heard rumors of the indictment (R. Vol. 1).

The Government, for whatever reason, chose to willfully ignore the judicially authorized justification for the Rule 6(e)(4) sealing -- the arrest of defendant Mitchell before he could flee -- and thereby continued the sealing for an additional, and unnecessary, seven months. All of this was done without

notice to any judicial officer. This is clearly contrary to both of the remaining protections afforded in the area.

First, by its unilateral decision not to arrest Mitchell and unseal the indictment, the Government usurped the judicial role preserved by the express terms of Rule 6(e)(4). See Southland, supra at 1380. Second, by its actions, the Government clearly violated both the implicit terms of the sealing authorization herein and, in so doing, the requirement that the sealing of an indictment past the expiration of the statute of limitations be for no more than a "reasonable" time. Edwards, supra at 647.

Both the judicial oversight required by the provisions of Rule 6(e)(4) and the reasonableness requirement as to the duration of the sealing were clearly and willfully ignored in the instant case.

Yet, the requirement that Petitioner show substantial, irreparable, actual prejudice has denied him relief, even though that question was deemed a "close one" by the district court. The end effect of this requirement which has now been adopted by at least three circuits is to insulate from meaningful redress even the most egregious and intentional disregard for the remaining protections encompassed by Rule 6(e)(4). With this comes the evisceration of the protections afforded by the statute of limitations.

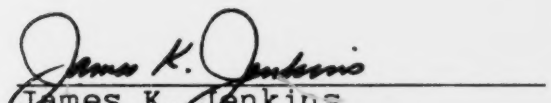
The lack of guidance from this Court in this area has had and will continue to have a telling effect on the use and administration of the Rule 6(e)(4) exception to the heretofore absolute bar of the statute of limitations. The actual prejudice requirement deserves careful consideration lest it continue to insulate and absolve all misuse and

misconduct committed in this area. In the alternative, specific provisions requiring periodic judicial review of the continued need for the sealing (e.g., every 60 or 90 days) should be created to insure that both the protection of the judicial oversight and the reasonableness of duration requirement will be enforced in a meaningful fashion. To do otherwise is to carve out a virtually unsupervised, unreviewable exception to the statute of limitations, and to abdicate the administration of this vital and historic protection to the party whose actions it was created to restrain.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,



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Counsel of Record

March 29, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-8207
Non-Argument Calendar*

D.C. Docket No. 82-404

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAWRENCE McKINLEY,
Defendant-Appellant.

Appeal from
the United States District Court
for the Northern District of Georgia

(December 9, 1986)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*Fed.R.App.P. 34(a); 11th Cir. R. 23.

Judgement Entered: December 9, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8207

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAWRENCE McKINLEY,
Defendant-Appellant.

Appeal from
the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion December 9, 11 Cir., 1986,
____F.2d____).(January 28, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:
(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) the Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for rehearing en banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of the cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

REHG-6
(Rev. 6/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL NO.
	)	CR82-404A-2
LARRY McKINLEY	)	

ORDER

The above-styled matter is presently before the court on defendant Larry McKinley's motion to dismiss the indictment. The essential background facts of this action are set forth in United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985), and will be repeated only inasmuch as they impact on the present motion.

On June 8, 1984, this court previously granted defendant's motion to dismiss the indictment on sixth amendment grounds. See Fed.R.Civ.P. 48(b). The court analyzed the sixth amendment claim using the framework of Barker v. Wingo,

407 U.S. 514, 92 S. Ct. 2182 (1972), as outlined in United States v. Dennard, 722 F.2d 1510 (11th Cir. 1984). The Eleventh Circuit agreed with this court's analysis of the first three Barker factors and the finding that because only two of the first three Barker factors weighed heavily against the government, the defendant was required to show actual prejudice. Mitchell, supra, 769 F.2d at 1547.

The Eleventh Circuit, however, remanded the case, stating that "the defendants must show actual prejudice in order to have the indictment dismissed. That the indictment was sealed beyond the limitations period may figure into the prejudice decision, but that fact alone does not dictate a finding of prejudice." Id. at 1548. This burden upon defendant was reaffirmed in United States v. Edwards, 777 F.2d 644 (11th

Cir. 1985), in which the Circuit reiterated that an indictment maintained under seal beyond the limitation period could be dismissed "only upon a showing of substantial, irreparable, actual prejudice to the defendants." Id. at 649.

Mr. McKinley in his present motion to dismiss attempts to meet his burden and demonstrate that he has been prejudiced by the sealing of the indictment in two distinct manners.

First, defendant contends that he has been prejudiced by the loss of the testimony of Mr. Al Horn. Mr. Horn died after the indictment was unsealed but prior to trial. At least one Circuit has indicated that in order to dismiss the indictment, the prejudice to the defendant must occur during the time that the indictment is sealed. United States v. Muse, 633 F.2d 1041, 1042 (2d Cir. 1980), cert. denied 450 U.S. 984 (1981).

In a hearing on this matter, defendant indicated that Mr. Horn, had he been available, would have primarily testified on a collateral issue. Further, had the issue of Mr. Horn's purported testimony come up during trial, the court could have made some accommodation to protect defendant or make Mr. Horn's position known to the jury. At the hearing on the motion to dismiss there were discussions about whether Mr. Horn's testimony would even be necessary if the government presented its case in a certain manner. As a matter of record, the issue did not come up at trial and the "need" for Mr. Horn's testimony became moot.

The court concludes that the loss of Mr. Horn's live testimony does not establish actual prejudice under the Barker and Dennard tests.

Defendant's other and more substantial argument for actual prejudice focuses on the claim of lost records of the dissolved corporation, Atlantic Southeastern Company, Inc. (Atlantic). Atlantic was a corporation alleged to have been primarily run by Mr. McKinley's brother and not the defendant. Although there are records that indicate that the defendant, Lawrence McKinley, was the President of this company, see, e.g., Government's exhibit 20 (evidentiary hearing before Magistrate Dougherty on July 8, 1985); Defendant's exhibit 1 (hearing before Judge Tidwell on January 15, 1986), he testified that he was only the Vice President.

Atlantic dissolved in September 1982. Defendant McKinley testified that he destroyed all the records of Atlantic sometime in early 1983 during the period that the indictment was sealed. The

defendant asserts that these records contained documents such as purchases for the corporation, deposits slips, and airline and hotel reservations, whether made on behalf of the corporation or for his own use. The defendant argues that he cannot remember exactly where he was during the dates of the indictment, but asserts that these destroyed records would have demonstrated that he was at a different location than specified in the indictment. The records would also allegedly prove that Mr. Mitchell was not an owner of Atlantic and thus refute other of the government's contentions.

The fact that the defendant has memory lapses does not in and of itself establish prejudice. See Dennard, supra at 1513-14. The claimed loss of physical evidence, though, is a more difficult question. Whether the destroyed

documents could have, in fact, demonstrated that defendant McKinley was somewhere other than where the indictment locates him is unknown. The need and the extent to which these documents would have been helpful to the defendant is highly questionable. The answers to the questions of whether the alleged documents would have even contained all the type of information and receipts claimed to have been included, and whether these documents would not have been destroyed if the indictment had remained unsealed, largely turns upon the credibility of defendant McKinley. Although some "undestroyed documents" have been uncovered, there are no tax returns or credit card statements or other items that might independently corroborate all the claimed activity performed by Mr. McKinley during the time period. The same is true for the issue of Mr. Mitchell's lack of

involvement with Atlantic, which the court notes, did not arise during trial.

The question is a close one. However, the government has successfully impeached the defendant on a handwriting sampler after the defendant denied writing certain documents. Considering the impeachment as to that issue and after weighing all the evidence, the court concludes that defendant's credibility has been placed in substantial doubt and that defendant has not sufficiently satisfied his burden of showing "substantial, irreparable, actual prejudice" because of the sealing of the indictment.

Defendant McKinley's motion to dismiss is denied.

SO ORDERED, this 19 day of February, 1986.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT